Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1439

HARRY T. NUSBAUM, Judge of the Civil Court of the City of New York (Plaintiff-Intervenor),

Petitioner,

against

JOHN J. GHEZZI, individually and in his capacity as Acting Secretary of State, of the State of New York; HERMAN KATZ, individually and in his capacity as City Clerk of the City of New York; *et al.*,

Respondents.

PETITION OF HARRY T. NUSBAUM, JUDGE OF THE CIVIL COURT OF THE CITY OF NEW YORK, FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION OF HARRY T. NUSBAUM, JUDGE OF THE CIVIL COURT OF THE CITY OF NEW YORK, FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Harry T. Nusbaum, a Judge of the Civil Court of the City of New York, at the direction and authorization of the Board of Judges thereof, applied for and was granted leave to intervene as a plaintiff at a

hearing before District Judge GRIESA (p. 11a, *infra*) and for the reasons hereinafter set forth, he separately petitions this Court that a writ of certiorari issue to review the final judgment of the United States Court of Appeals (Second Circuit) entered therein on March 3, 1975, unanimously affirming in an opinion *per curiam*, an order of the United States District Court (Southern District of New York) "denying a motion to convene a three-judge court and dismissing the complaint, which sought declaratory and injunctive relief against mandatory age restrictions upon the term of office of certain state judges" (p. 2a, *infra*):

> (a) elected to the Civil Court of the City of New York for a "normal ten-year term of office" during which they are assignable and are assigned and serve as Acting Supreme Court Justices, with the full powers, duties and jurisdiction of Supreme Court Justices, but not given the benefit of the statutory certification procedure applicable to elected Supreme Court Justices, whereby it is determined whether such Justice is mentally and physically able to continue in judicial service during his unexpired term of office after the age of 70,
>
> (b) which certification procedure is statutorily available during such unexpired term for successive two-year periods until the age of 76 for elected but not for assigned Supreme Court Justices.

Opinions Below

The opinion of affirmance of the United States Court of Appeals (Second Circuit) dated March 3, 1975, not yet reported, is reproduced as Appendix A, *infra* (p. 1a) and its judgment as Appendix B, *infra* (p. 7a). United States

District Judge GRIESA (Southern District of New York) orally rendered his "bench decision" on October 18, 1974, reproduced as Appendix C, *infra* (p. 9a).

Jurisdiction

Jurisdiction is invoked under 28 U.S.C. [U.S.C.A.] §§ 2281-2284.

Question Presented

Is the following of substantial federal constitutional magnitude to have justified the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281-2284:

> Is it a denial of Due Process and Equal Protection not to afford Judges elected to the New York Civil Court, assignable and assigned and who serve as Supreme Court Justices of the State of New York, the same "individualized determination" accorded to elected Supreme Court Justices, whereby it may be certified during their normal and unexpired term of office that upon reaching the age of 70 such Justices may continue to serve during their unexpired terms of office for successive two year periods until the age of 76?

Constitutional and Statutory Provisions Involved

1. *Art. 6, § 25, subd. b of the New York State Constitution* and *§ 23 of the New York Judiciary Law.* It is provided in Art. 6, § 25 of the *New York State Constitution* that:

> "b. Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's

court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he reaches the age of seventy. Each such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of a justice of the supreme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically able and competent to perform the duties of such office. Any such certification shall be valid for a term of two years and may be extended as provided by law for additional terms of two years. A retired judge or justice shall serve no longer than until the last day of December in the year in which he reaches the age of seventy-six.

* * *

c. The provisions of this section shall also be applicable to any judge or justice who has not reached the age of seventy-six and to whom it would otherwise have been applicable but for the fact that he reached the age of seventy and retired before the effective date of this article."

2. *New York State Judiciary Law,* § 23, provides:

"§ 23. Age limitation on term of judicial office

No person shall hold the office of judge, justice or surrogate of any court, whether of record or not of record, except a justice of the peace of a town or police justice of a village, longer than until and including the last day of December next after he shall be seventy years of age * * *."

3. *New York State Judiciary Law,* § 115, provides:

"§ 115. Retired justices of the supreme court

1. Any justice of the supreme court, retired pursuant to subdivision b of section twenty-five of article six of the constitution, may, upon his application, be certified by the administrative board for service as a retired justice of the supreme court upon findings (a) that he has the mental and physical capacity to perform the duties of such office and (b) that his services are necessary to expedite the business of the supreme court. A copy of such certificate shall be filed with the appellate division of the department in which such retired justice resides and in the office of the secretary of state.

2. Any such certification shall be valid for a term of two years beginning on the date of filing the certificate. At the expiration of such term the retired justice may be certified for additional terms of two years each by the administrative board upon findings of continued mental and physical capacity and need for his services. No retired justice may serve under any such certification beyond the last day of December in the year in which he reaches the age of seventy-six.

3. A retired justice so certified shall for all purposes, other than determining the number of justices in a judicial district for the purposes of subdivision d of section six of article six of the constitution and section one hundred forty-a of this chapter, but including powers, duties, salary, status and rights, be a justice of the supreme court in the district in which he resides when so certified. A retired justice shall be subject to assignment by the appellate division of the supreme court of the judicial department of his residence.

4. The provisions of this section shall also be applicable to a justice of the supreme court, a judge of the county court of a county within the city of New York, and a judge of the court of general sessions of the county of New York who has not yet reached the age of seventy-six and who reached the age of seventy and retired as such justice or judge prior to the effective date of this section."

4. *New York State Constitution,* Art. 6, §26, provides:

"b. A judge of the court of claims may perform the duties of his office or hold court in any county and may be temporarily assigned to the supreme court in any judicial district."

* * *

"g. A judge of a court for the city of New York established pursuant to section fifteen of this article may perform the duties of his office or hold court in any county and may be temporarily assigned to the supreme court in the judicial department of his residence * * *."

Also:

"k. While temporarily assigned pursuant to the provisions of this section, any judge or justice shall have the powers, duties and jurisdiction of a judge or justice of the court to which assigned. After the expiration of any temporary assignment, as provided in this section, the judge or justice assigned shall have all the powers, duties and jurisdiction of a judge or justice of the court to which he was assigned with respect to matters pending before him during the term of such temporary assignment."

5. *United States Constitution, Fourteenth Amendment*

No state "shall deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Plaintiff Zichello was a Judge of the Civil Court of the City of New York elected for a term which commenced on January 1, 1970; the normal judicial term of office is ten years (*New York State Constitution,* Art. 6, § 25). Judge Zichello, born in 1904, was subject to mandatory retirement on the last day of December, 1974 (*New York State Judiciary Law,* § 23). Judge Nusbaum, who as noted, was granted leave to intervene as a plaintiff at the hearing before the District Court (p. 11a, *infra*) "was elected on November 4, 1969" to the Civil Court and "will become 70 in 1978"; his mandatory retirement will occur on December 31, 1978, "one year prior to the end of the normal ten year term" (p. 3a, *infra*).

The complaint broadly sought a declaratory judgment to the effect that "Article 6, Section 25 of the *New York State Constitution* and Section 23 of the *New York State Judiciary Law* are unconstitutional in so far as they require elected Judges whose terms of office have not expired to retire from their elected positions" and an injunction against the enforcement thereof; also, that a three-judge court be convened pursuant to 28 U.S.C. [U.S.C.A.] §§ 2281-2284.

Judge Nusbaum, however, did not contend (as also urged in *amicus* briefs submitted below by the New York City Family Judges Association and the American Association of Retired Persons) that the State of New York

may not constitutionally mandate the retirement of a Judge at age 70, or that generally mandatory retirement statutes, provisions, practices and policies are unconstitutional. This petitioner's contention, as indicated in the question presented here (p. 3, *supra*) places his constitutional challenge in a more specifically delineated, narrowly defined focus.

Reasons for Granting the Writ

The basis of the Court of Appeals opinion *per curiam* is:

> "It would appear that without question the state could rationally determine that, in the interests of judicial efficiency and the encouragement of younger attorneys with judicial aspirations, a mandatory age limitation of 70 for inferior court judges was reasonable." (Emphasis supplied, p. 5a, *infra*)

According to statistics compiled by the President of the Board of Judges of the Civil Court, in 1974 forty-eight Judges of that Court were assigned and served as Acting Supreme Court Justices and in that year disposed of 4,530 civil Supreme Court cases out of a total disposition count of 21,046, or a little over 25% of the total.* Judge Nusbaum at the time of the proceedings

* Note, for example, the opinion of Civil Court Judge SHERMAN as a Justice of the Supreme Court under assignment thereto (*Golini* v. *Nachtigall*, 75 Misc 2d 523 [Sept. 20, 1973]) and his opinion in the same volume as a Civil Court Judge (*Drexel Burnham Co., Inc.* v. *Silverman, et al.*, 75 Misc 2d 904 [Nov. 8, 1973]). There is no indication that the Supreme Court opinion or its author is that of an "inferior court judge", or is in any different category than those appearing in the same Law Report by an elected Supreme Court Justice, e.g., *Redlich* v. *Capri Cinema*, 75 Misc 2d 117 (Aug. 14, 1973).

below was by order of the Administrative Judge, approved by the Presiding Justice of the Appellate Division, First Judicial Department of the State of New York, assigned to "hold the designated term in the Supreme Court, Civil Branch, Bronx County" for the period therein specified; nor will it be disputed that New York Civil Court Judges have been and are now being assigned to serve in the Felony and Criminal Terms of the Supreme Court of the State of New York.

Moreover, the Court of Appeals of the State of New York has held that a judge "assigned to the supreme court" pursuant to Article 6, § 26 of the *New York State Judiciary Law*, is not "inferior" either in service or status and may, as is actually the case, perform all of the judicial duties incumbent upon an elected Supreme Court Justice. In *Matter of Taylor* v. *Sise*, 33 NY 2d 357, petitioners, indicted for drug felonies, challenged the constitutionality of the assignment to the Supreme Court (pursuant to § 26, subd. b of the *New York State Judiciary Law*) of Judges of the Court of Claims before whom they were to be tried, rather than before a regularly elected Supreme Court Justice. Judges of the Civil Court were likewise assignable and assigned under the same statute both to the Civil and Criminal branches thereof (p. 6, *supra*).

The indicted petitioners claimed that the *New York State Constitution* "provides for election of Supreme Court Justices by electors of the judicial district in which they are to serve" and that "in New York City the Supreme Court has 'exclusive jurisdiction over crimes prosecuted by indictment.'" Therefore, they were entitled to be tried before "a properly elected Supreme Court Justice" (p. 363). The Court of Appeals, in an opinion by Chief Judge BREITEL, after referring to the foregoing New York State constitutional provision (Art. 6, § 26, subds. b, g) heretofore quoted (p. 6, *supra*), held:

> "There is nothing in the Constitution which precludes any Judge so assigned from sitting on a felony trial. On the contrary, the Constitution provides that '[w]hile temporarily assigned pursuant to the provisions of [section 26], any judge or justice shall have the powers, duties and jurisdiction of a judge or justice of the court to which assigned' (N.Y. Const., art. VI, § 26, subd. k). These provisions support the conclusion that, rather than providing a defendant with a right to trial by an elected Judge, the constitutional provision requiring election of Supreme Court Justices is merely the method by which the State has decided to choose its regular Supreme Court Justices." (pp. 362-4)

The opinion further notes that "[t]he Appellate Division order in the instant case designates the respondent [Court of Claims Judges] to act as Supreme Court Justices in the criminal term 'until the further order of this Court'" and that "the indefiniteness of the assignment is equivalent to a temporary designation." It is not controlling on the constitutional issue here presented whether, as the dissenting opinion in *Taylor* asserts, the legislative scheme contemplated that judges who "serve by assignment exclusively in the Supreme Court" will do so "presumably for their full terms" or whether "[b]y no stretch of the imagination can they be deemed on 'temporary assignment' to the Supreme Court." (p. 368) New York Civil Court Judges assigned to the Supreme Court may be required to serve at least some part or parts, or for that matter the full remainder of their normally elected terms of office in order to dispose of a substantial number of cases there pending; also, "the judge or justice assigned" continues to "have all the powers, duties and jurisdiction of a judge or justice of the court to which

he was assigned with respect to matters pending before him" and not completed during the period of assignment (p. 6, *supra*).

Taylor in any event clearly holds that judges so assigned are not, to quote the opinion below, "inferior court judges" rendering judicial service in the Supreme Court. In the foregoing context there is "nothing rational" to quote this Court (*Stanton, infra*) in the classification drawn below that New York Civil Court Judges, qualified and assigned under the *New York State Constitution* to serve as Supreme Court Justices, are "inferior court judges" and are therefore subject to the mandatory age limitation of 70, arbitrarily cutting off the remainder of their unexpired normal judicial term, without according them the statutory certification procedure made available to elected Supreme Court Justices for the continuation of their judicial services for successive two year periods during their unexpired judicial term of office, after reaching 70.

No difficulty seemingly has been encountered, as a plenary hearing before a three-judge court would demonstrate, with the statutory procedure whereby it may be "certificated" that after the age of 70 such judge "is mentally and physically able and competent to perform the duties of such office." (pp. 3-5, *supra*). This case therefore does not present any burdensome task of innumerable "individual determinations of physical impairment and senility".[1] The *New York State Constitution* and the statutes here involved contain their own internal recognition that the state has the readily available means for the certification process as to whether judicial service may thereafter be effectively performed by any judge reaching the age of 70 during his normal judicial term of office (pp. 3-5, *supra*).

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[1] *Cleveland Bd. of Ed.* v. *LaFleur*, 414 US 632 at p. 659.

The opinion below glosses over the specific constitutional issue here urged by acting on the unchallengeable premise that the Court "does not deem age to be a suspect classification" (p. 5a, *infra*). Although neither age-based, nor sex-based classifications are inherently suspect (*Stanton* v. *Stanton*, dec. Apr. 15, 1975, 43 United States Law Week 4449), this Court has most recently held that a Utah statute specifying a greater age of majority for males than females denies, in the context of child support, equal protection.

The appellee in *Stanton* contended "that the test is that of rationality and that the age classification is a rational basis and endures any attack based on equal protection." The different treatment accorded males and females in the respective specifications as to the age of attaining majority was sought to be defended on the ground that "men, because they have a primary responsibility to provide a home, should be accorded more time for education and training before they assume that responsibility." This Court found that an "old notion" and decided that there was "nothing rational" in the statutory age classification because "no longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. * * * If a specified age or minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for the girl."

So here, a classification cannot be sanctioned as rationally grounded on the premise, to quote the opinion below, "that the interests of judicial efficiency and the encouragement of younger attorneys with judicial aspirations" make "a mandatory age limitation of 70" for so termed "inferior court judges" reasonable (p. 5a, *infra*) because in the incontestable posture here presented,

judges of the Civil Court so characterized as "inferior" are assignable to serve, fulfill and in all respects complete the assigned judicial tasks of a Supreme Court Justice, even after returning to the courts to which they were elected (p. 6, *supra*).

The New York Attorney General, in contending that "the people of the State have a right to continue superior court judges since apparently, they consider their service and experience more valuable", not only characterized Civil Court Judges who have attained the age of 70 as "superannuated", but maintained that when assigned to the Supreme Court they simply are "additional judicial manpower and involve a different category of judges."*

A civil litigant or an indicted felon whose case is set for trial before a New York Civil Court Judge assigned to the Supreme Court, as indicated, may not validly claim that he is unconstitutionally deprived of the right to have his case tried before a "superior" court judge because the Civil Court Judge gets less pay while acting, serving and completely fulfilling the functions of a Supreme Court Justice and, moreover, hardly justifies the invidious discriminatory conclusion, that the "service and experience" of those elected, rather than assigned to the Supreme Court, are "more valuable" (*Mtr. of Taylor, supra*).

Although "in the interest of judicial efficiency and the encouragement of younger attorneys with judicial aspirations, a mandatory age limitation of 70 for inferior court judges" may, in the language of *La Fleur* (p. 648), "represent a good faith attempt to achieve a laudable goal, they cannot pass muster under the Due Process clause of the Fourteenth Amendment" because they unconstitutionally employ the irrebuttable presumption that a New

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* Attorney General's brief below, pp. 13, 26.

York Civil Court Judge on December 31 after he reaches the age of 70 can no longer competently complete the normal term of office for which he was elected. It might be easier to presume conclusively that all Civil Court Judges are unfit to render judicial service past the age of 70 by categorizing them as "inferior court judges", but convenience alone "is insuffiicent to make valid what otherwise is a violation of the Due Process clause" (*La Fleur, supra,* p. 647).

Manifestly, that a New York Civil Court Judge is assigned, rather than elected, to the Supreme Court, can have nothing to do, to use the language of the *New York State Constitution* (p. 5, *supra*) with whether "he is mentally and physically able and competent to perform the full duties" thereof during his unexpired term of office after the age of 70. The mandatory arbitrary termination here challenged violates the Due Process clause of the Fourteenth Amendment perforce of the unwarranted conclusive presumption that Civil Court Judges, although assignable and assigned to the Supreme Court, are not "mentally and physically able and competent [during their unexpired term] to perform the full duties of that office" for two year successive periods until the age of 76 and are not entitled to the benefit of the statutory certification procedure as aforesaid. Nor can New York Civil Court Judges, assignable and assigned to the Supreme Court, be arbitrarily placed, to quote the New York Attorney General, in "a different category of judges" and thereby avoid petitioners' constitutional thrust.

Booth v. *United States,* 291 U.S. 339, presented an analogous situation. The question posed was whether a United States District Judge who after the age of 70 did not resign, but retired under § 260 of the Judicial Code, as amended (USC 28, § 375), can continue in office within the meaning of § 1 of Article 3 of the *Constitution,* which forbids the diminution of the compensaton of judges during their continuation in office. In answering that question in the affirmative, this Court noted that a retired judge may be called upon to perform judicial duties in his own circuit "or by the Chief Justice to perform them in another circuit" and that the purpose is that "he shall continue so far as his age and health permit to perform judicial service" and moreover, "it is common knowledge that retired judges have in fact discharged a large measure of the duties which would be incumbent upon them if still in regular service" and "that a retired judge's judicial acts would be illegal unless he who performed them held the office of judge." This Court observed that "it is a contradiction in terms to assert that one who has retired in accordance with the statute may continue to function as a federal judge and yet not hold the office of a judge" (p. 350). So here, it would be a contradiction in terms to say that a Civil Court Judge assignable and assigned to the Supreme Court is not entitled to the statutory benefit of the individualized determination statutorily made available to elected Supreme Court Justices as to their competence, mentally and physically, to continue in judicial service during their unexpired term after the age of 70.

A closer parallel is found in *United States* v. *Moore,* 101 Fed. 2d 56 (1939), wherein the defendant in a criminal prosecution challenged "the power of the acting district judge to perform the duties of a District Judge for the Southern District of New York." Citing *Booth,* it was hdd that retired Justice Willis Van Devanter of this Court, under the provisions of 28 USCA, § 375a "may nevertheless be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any julicial circuit, including those of a circuit judge in such

circuit, as such retired justice may be willing to undertake" and "therefore was empowered to act as a District Judge for the Southern District of New York." (pp. 58-9)

The Court below misplaced its reliance upon *Weisbrod* v. *Lynn*,[2] in which this Court affirmed a judgment dismissing the complaint for a declaratory judgment that the Federal Employee Mandatory Retirement Law, 5 USC, § 8335, requiring automatic separation from service of federal employees who became 70 and who have completed 15 years of service because such statutory provisions "are constitutional on their face and as applied". *Weisbrod* in turn relied on *McIlvaine* v. *Penn*,[3] rejecting a constitutional challenge to the Pennsylvania Administrative Code mandating retirement of state policemen at the age of 60.

Neither case, we submit will support as a rational classification that which treats a Civil Court Judge assignable or assigned to the Supreme Court as the equivalent and having the full status of a Supreme Court Justice when it involves the performance of the judicial duties thereof, and yet when it comes to a 70-year age-based limitation such judge can be treated as an "inferior court judge" conclusively presumed to be unable mentally and physically to continue in judicial service after the age of 70 and not entitled to the benefit of the certification procedure available to an elected Supreme Court Justice, whereby it is determined whether such justice is mentally and physically able to continue his judicial duties during his unexpired term; a certification procedure avail-

[2] 43 U.S.L.W. 3461, Feb. 24, 1975; pp. 5a-6a, *infra*.

[3] 415 US 986, Mar. 25, 1975.

able for successive two-year periods until the age of 76, but not extending the term of office for which he was elected (p. 6, *supra*).[4]

CONCLUSION

In view of the recent decisions of this Court, treating with the various facets and conclusions reached on the basic constitutional question here posed, summary disposition we respectfully submit is warranted; this petition for a writ of certiorari should be granted and the judgment of the Court below vacated with instructions that a three-judge court be convened, since this case clearly presents a substantial federal question (*Goosby* v. *Osser*, 409 US 512 (1973)).

Respectfully submitted,

SAMUEL GOTTLIEB
Counsel for Petitioner

[4] The New York Corporation Counsel's brief asserted that New York State's interest "in limiting the term of judicial office" was long ago expressed and made reference to the 1846 Constitution, as amended in 1870, providing that "[n]o person shall hold the office of judge or justice of any court longer than and until and including the last day of December next after he shall be seventy years of age." It is noteworthy that in the early 1900's "life expectancy was then 47 years and only 4% of the population was over 65" and that "today life expectancy is 72 years of age" ("American Society and the Over 65's", Dec. 19, 1974, New York Post, p. 53, quoting Donald Sherbond, consultant to the American Association of Retired Persons (AARP), who submitted a brief *amicus* below).

[APPENDICES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 511, 876—September Term, 1974.

(Argued January 22, 1975 Decided March 3, 1975.)

Docket Nos. 74-2374, 74-2435

PIETRO C. RUBINO, for himself and all other persons similarly situated; and PHILIP J. ZICHELLO,

Plaintiffs-Appellants,

HARRY T. NUSBAUM,

Plaintiff-Intervenor-Appellant,

—against—

JOHN J. GHEZZI, individually and in his capacity as Acting Secretary of State of the State of New York; et al.,

Defendants-Appellees.

Appendix A

Before:

LUMBARD, HAYS and MULLIGAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Hon. Thomas P. Griesa, *Judge*, denying a motion to convene a three-judge court and dismissing the complaint, which sought declaratory and injunctive relief against mandatory age restrictions upon the term of office of certain state judges.

Affirmed.

STEPHEN GILLERS, New York, New York (Elliot A. Taikeff, of Counsel), *for Plaintiffs-Appellants.*

GAINSBURG, GOTTLIEB, LEVITAN & COLE, New York, New York (Samuel Gottlieb, Alan C. Krieger, of Counsel), *for Plaintiff-Intervenor-Appellant.*

A. SETH GREENWALD, Asst. Attorney General, New York, New York (Louis J. Lefkowitz, Attorney General for the State of New York, Samuel A. Hirshowitz, First Asst. Attorney General, of Counsel), *for Defendant-Appellee Ghezzi and Attorney General, Pro se.*

Appendix A

WILLIAM P. DEWITT, New York, New York (Adrian P. Burke, Corporation Counsel for the City of New York), *for Defendants-Appellees Katz, Irizarry and New York City Board of Elections.*

DIKMAN & BOTTER, Jamaica, New York, *for New York City Family Court Judges' Ass'n, Amicus Curiae.*

MILLER, SINGER, MICHAELSON & RAIVES, New York, New York (Alfred Miller, Stephen L. Solomon, of Counsel), *for American Ass'n of Retired Persons, Amicus Curiae.*

PER CURIAM:

Philip J. Zichello, one of the named plaintiffs in this action commenced in the United States District Court for the Southern District of New York, was a Judge of the Civil Court of the City of New York, elected for a term which commenced on January 1, 1970. Although the normal term of office for this position is ten years, the New York State Constitution (Art. 6, § 25) and the Judiciary Law (§ 23) provide for mandatory retirement at the age of 70. Since Judge Zichello was born in 1904, his term expired under state law on the last day of December, 1974. The second named plaintiff, Pietro C. Rubino, is a voter over 70 who alleges that he voted for Zichello. The intervenor Harry T. Nusbaum, is also a Judge of the Civil Court of the City of New York who was elected on November 4, 1969 but who will become 70 in 1978, which will result in his mandatory retirement on December 31, 1978, or one year prior to the end of the normal ten-year term. The complaint below sought preliminary and permanent

injunctive relief against the enforcement of the cited state constitutional and statutory provisions as violative of the First and Fourteenth Amendments of the United States Constitution, and further sought the convening of a three-judge district court pursuant to 28 U.S.C. §§ 2281 & 2284. Rubino also sought class action treatment as the representative of all voters over 70 in the state, as well as all persons who voted for Judge Zichello. On the return day of an order to show cause, October 18, 1974, Judge Thomas P. Griesa of the United States District Court for the Southern District delivered an opinion finding that there was no substantial federal question which would justify the convening of a three-judge court and dismissed the complaint. This appeal followed.

The question before us is whether, under the rule of *Goosby* v. *Osser*, 409 U.S. 512 (1973), the district court properly determined that the constitutional grounds raised by the plaintiffs were wholly insubstantial and frivolous. We are of the opinion that the issue of age restrictions upon the term of office of state judges is properly one for the legislative or electoral processes of the State of New York and that the effort to clothe it in constitutional garb is frivolous. We therefore affirm the dismissal of the complaint.

The cases primarily relied upon by the plaintiffs to establish the First Amendment rights of the candidate to run for office and of the voter to be free to elect aged candidates (*Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Bullock* v. *Carter*, 405 U.S. 134 (1972); *Communist Party* v. *Whitcomb*, 414 U.S. 441 (1974); and *Storer* v. *Brown*, 415 U.S. 724 (1974)) all involved restrictions upon access to the ballot, which is not the issue here. The judges seeking relief here were on the ballot and no one was precluded from voting for them. Both took office for a term clearly

established by the legislature and the state constitution and they are properly subject to the conditions imposed by the state upon the length of the term. *Gordon* v. *Leatherman*, 450 F. 2d 562, 565 (5th Cir. 1971). We find no authority at all which would support the contention that Rubino as a citizen over 70 has any constitutional right to vote for the elderly. We do not deem age to be a suspect classification requiring any strict scrutiny of the state's scheme of age restrictions upon judicial terms of office. See *Weiss* v. *Walsh*, 324 F. Supp. 75 (S.D.N.Y. 1971), aff'd, 461 F.2d 846 (2d Cir. 1972), cert. denied, 409 U.S. 1129 (1973). It would appear that without question the state could rationally determine that, in the interests of judicial efficiency and the encouragement of younger attorneys with judicial aspirations, a mandatory age limitation of 70 for inferior court judges was reasonable.

The claim that the mandatory retirement age violates the due process and equal protection clauses is, we believe, clearly insubstantial in view of the holding of the Supreme Court in *McIlvaine* v. *Pennsylvania*, 415 U.S. 986 (1974). The Court there dismissed, for want of a substantial federal question, an appeal from the Pennsylvania Supreme Court which upheld a state law requiring retirement of police at age 60. On the basis of that decision, a three-judge court for the District of Columbia in *Weisbrod* v. *Lynn*, 383 F. Supp. 933 (1974) dismissed a complaint which sought a declaratory judgment that the Federal Employee Mandatory Retirement Law, 5 U.S.C. § 8335, was unconstitutional because it mandates a 70-year-old retirement age for federal employees irrespective of the health or mental abilities of the employee. The court there examined the Jurisdictional Statement in *McIlvaine* and concluded, as we have here, that the issues

of equal protection and due process* were before the Court in *McIlvaine,* and that the Supreme Court did not consider those issues to present a substantial federal question. An appeal was taken to the Supreme Court from the decision in *Weisbrod* and the Court affirmed the dismissal of the complaint. 43 U.S.L.W. 3464 (Feb. 24, 1975). Since the issues before us are substantially similar, if not identical, to those presented in *Weisbrod* and *McIlvaine,* we believe that the court below correctly concluded that there was no substantial federal question and properly dismissed the complaint.

Affirmed.

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* Appellants' principal due process argument is founded upon the irrebuttable presumption doctrine, *Cleveland Bd. of Educ.* v. *LaFleur,* 414 U.S. 632 (1974); *Vlandis* v. *Kline,* 412 U.S. 441 (1973), which has been said to resemble equal protection analysis, *Cleveland Bd. of Educ.* v. *LaFleur, supra,* 414 U.S. at 652 (Powell, J., concurring in result); Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974). The *Weisbrod* court was faced with the same argument.

APPENDIX B

Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of March one thousand nine hundred and seventy-five.

Present:

HON. J. EDWARD LUMBARD
HON. PAUL R. HAYS
HON. WILLIAM H. MULLIGAN

Circuit Judges,

74-2374
74-2435

PIETRO C. RUBIN, for himself and all other persons similarly situated, and PHILIP J. ZICHELLO,

Plaintiff-Appellant,

HARRY T. NUSBAUM,

Plaintiff-Intervenor,
Appellant,

v.

Appendix B

JOHN J. GHEZZI, individually and in his capacity as Acting Secretary of State of the State of New York, HERMAN KATZ, individually and in his capacity as City Clerk of the City of New York, IVAN E. IRIZARRY, individually and in his capacity as Finance Administrator of the City of New York, and ALICE SACHS, ELRICH A. EASTMAN, HERBERT J. FEUER, CHARLES A. AVARELLO, JAMES F. BASS, ELIZABETH A. CASSIDY, ANTHONY SADOWSKI, JOSEPH J. PREVITE, STANLEY C. KOCHMAN, and SALVATORE SCALFINI, all individually and in their capacities as the members of the Board of Elections of New York City,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. DANIEL FUSARO, Clerk
By VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX C

Opinion of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 4332

PIETRO C. RUBINO, for himself and all other persons similarly situated and PHILIP J. ZICHELLO,

Plaintiffs,

v.

JOHN J. GEZZI, *et al.*,

Defendants.

New York, New York
October 18, 1974

Before:

HON. THOMAS P. GRIESA, D.J.

Appearances:

STEPHEN GILLERS, ESQ.
ELLIOT A. TAIKEFF, ESQ.
Attorneys for Plaintiffs

WILLIAM P. DEWITT, ESQ.
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Appendix C

A. Seth Greenwald, Esq.
Asst. Attorney General, State of New York

Joseph Samet, Esq.
Assn. Civil Court Judges

Samuel Gottlieb, Esq.
Attorney for proposed intervenors and/or amicus curiae

Michael Dikman, Esq.
Assn. Criminal Court Judges

Elliot Riskind, Esq.
Assn. Criminal Court Judges

The Court: Let me put my decision on the record.

This is an action brought by Philip J. Zichello, a Judge of the Civil Court in New York City, who was elected to that office on November 4, 1969, and assumed his duties on January 1, 1970.

Judge Zichello was born November 1, 1904, and will be 70 years old at the first of November of this year.

Judge Zichello seeks a declaration of the invalidity of the provision in the New York Constitution and the provision in the New York Judiciary Law providing mandatory retirement of Civil Court Judges at the age of 70.

The relevant provision are Article VI, Section 25B of the New York Constitution and Section 23 of the New York Judiciary Law.

Judge Zichello urges that he is entitled to serve his full ten-year term as provided by another provision of the New York Constitution, Article VI, Section 15.

All of these constitutional and statutory provisions have been in effect for a number of years and were in effect

Appendix C

at the time Judge Zichello was elected in 1969, and at the time he assumed his duties, January 1, 1970.

In addition to Judge Zichello, there is also a plaintiff by the name of Pietro C. Rubino. Mr. Rubino is a voter in the district which elected Judge Zichello. He voted for Judge Zichello. He is over 70 years of age. He brings this action on behalf of himself and in behalf of all other persons who voted for Judge Zichello in 1969 and all eligible voters in the state over the age of 70.

Judge Zichello does not attempt to represent a class. As of today, intervention was permitted to another Civil Court Judge, Harry T. Nusbaum.

The plaintiffs request the convening of a three-judge court under 28 USC Section 2281 on the ground that this is an action to enjoin a state statute.

The defendants urge that there is no substantial federal question, no substantial constitutional question, and that the three-judge court should not be convened and the action should be dismissed.

I am denying the motion to convene a three-judge court and dismissing the action.

A variety of arguments have been made to the effect that the mandatory retirement provisions under New York law applicable to the Civil Court Judges violate the United States Constitution, particularly the First and Fourteenth Amendments.

I find that none of these arguments are substantial. For instance, plaintiffs argue that the 70 year retirement provision violates Judge Zichello's First Amendment right to seek and hold office. The cases cited under this heading of the argument have nothing really to do with a retirement provision.

Appendix C

In my view there is no case under the First Amendment which can reasonably be interpreted as preventing the State of New York from establishing terms for its elected officials, including judges, and as part of the establishment of such terms, it would seem obvious that the State may, in its Constitution and in its statutes, provide for retirement of judges at the age of 70 years.

I will not deal specifically with every single one of the constitutional arguments presented by plaintiffs. I will not deal specifically in this bench decision with each and every such argument. I have considered the arguments and I find them without merit.

Basically, it seems to me clear that the people of the State of New York in their Constitution and the Legislature of the State of New York in its Judiciary Law have the unquestioned right to provide for mandatory retirement of judges at the age of 70. There can be no reasonable argument in my view that such constitutional and statutory provisions deprive Judge Zichello of liberty or property, or interfere with his First Amendment rights under the Federal Constitution.

There is abundant evidence, to say the least, of actions taken by administrative boards, the Congress of the United States, and state legislatures in establishing retirements for the age of 70 or ages thereabouts. There is such a body of legislative activity of this kind as to make it really impossible to say that the people of New York and the Legislature of New York were unreasonable in their mandatory retirement provisions or violated the Federal Constitution in any way.

One specific argument should be dealt with, and that is an equal protection argument relating to a differentiation in treatment as to the Civil Court Judges versus certain other judges or justices of the state.

Appendix C

It is provided in the case of the Judges of the New York State Court of Appeals and Justices of the Supreme Court that these two types of judges may, following the age of 70, perform the duties of a Justice of the Supreme Court provided that it shall be certificated that the services of such Judges or Justices are necessary to expedite the business of the court, and that such persons are mentally and physically able and competent to perform the full duties of such office. Service under this provision may be made under the conditions specified until the individual reaches the age of 76.

It seems to me perfectly clear that this is not a denial of equal protection. The legislature and the people of the State of New York in their Constitution and in their Judiciary Law had a perfectly valid ground, without question, to make a minor differentiation between the two categories of judges and provide for a short additional service under certain circumstances for Court of Appeals Judges and Supreme Court Justices in the State Supreme Court.

The differentiation in treatment does not in my view in any way raise a constitutional question. It goes without saying that in my dismissal of this case and in my refusal to convene a three-judge court, I am in no way indicating any lack of sympathy with the position and views of Judge Zichello and the others who have appeared before me today and the others who are interested in this proceeding.

I know as well as anyone that men who have passed the age of 70 years can continue to perform all kinds of services, including services on the judiciary, and I

know as well as anyone that blanket retirement rules can have their effects of imposing hardship in individual cases. But it is equally clear that it is my limited function to try to assess the existence or non-existence of a valid question as to whether the New York provisions violate the Federal Constitution.

I am not acting as a drafter of the New York Constitution or as a member of its Legislature, and having in mind my limited role, I cannot conscientiously hold that there is any constitutional question which requires the continuation of this action and I am dismissing it.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1439
No. 74-1468

Supreme Court, U. S.
FILED
JUL 9 1975
MICHAEL RODAK, JR., CLERK

HARRY T. NUSBAUM, Judge of the Civil Court of the City of New York (Plaintiff-Intervenor),

Petitioner,

against

JOHN J. GHEZZI, individually and in his capacity as Acting Secretary of State of the State of New York; HERMAN KATZ, individually and in his capacity as City Clerk of the City of New York; et al.,

Respondents.

PIETRO C. RUBINO, for himself and all other persons similarly situated; and PHILIP J. ZICHELLO,

Petitioners,

against

JOHN J. GHEZZI, individually and in his capacity as Acting Secretary of State of the State of New York; et al.,

Respondents.

BRIEF FOR RESPONDENT GHEZZI AND PRO SE IN JOINT OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

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HARRY T. NUSBAUM, Judge of the Civil Court of the City of New York (Plaintiff-Intervenor),

Petitioner,

against

JOHN J. GHEZZI, individually and in his capacity as Acting Secretary of State of the State of New York; HERMAN KATZ, individually and in his capacity as City Clerk of the City of New York; et al.,

Respondents.

PIETRO C. RUBINO, for himself and all other persons similarly situated; and PHILIP J. ZICHELLO,

Petitioners,

against

JOHN J. GHEZZI, individually and in his capacity as Acting Secretary of State of the State of New York; et al.,

Respondents.

BRIEF FOR RESPONDENT GHEZZI AND PRO SE IN JOINT OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

Opinions Below

In the courts below, the opinion of the Court of Appeals for the Second Circuit is now found at 512 F. 2d 431, and is also reproduced at p. 1a (Appendix A) in both appendices

of the several petitions.* The opinion of the District Court is unreported and is reproduced as Appendix C, 9a.

Jurisdiction

Both petitions rely on 28 U.S.C. § 1254(1), to invoke the jurisdiction of this Court.

Questions Involved

Is a substantial federal question presented by the State constitutional and statutory requirement that judges retire at age 70?

Statement of the Case

The judicial petitioner in 74-1468 (*Rubino* v. *Ghezzi*) is a now retired judge who was elected to the Civil Court of the City of New York for a term starting January 1, 1970. Normally that term is for 10 years, N.Y.S. Const., Art. 6, § 15, subsec. a, but since the Judge, Philip J. Zichello, was born November 1, 1904, the State Constitution, Art. 6, § 25 and Judiciary Law § 23 mandated his retirement at the end of 1974, the year he attained 70 years. His successor has now been elected and is serving.

The other petitioner in 74-1468, Pietro C. Rubino, is a voter over 70, who alleged that he voted for Judge Zichello.

The petitioner in 74-1439 is a purported intervenor in the *Rubino* action. He is also a Judge of the Civil Court, elected at the same time as Judge Zichello but attains 70 in 1978, with mandatory retirement at the end of that year. This is one year prior to the end of the normal ten-year term (3a). It should be noted that while Judge Nusbaum

* In the interests of simplicity, reference will be made only to appendix pages in the *Nusbaum* petition (74-1439).

was permitted to intervene in the District Court (11a), he never filed any motion or pleadings to that affect as required by the Federal Rules of Civil Procedure, Rule 23(c).

The petitioners in *Rubino* sought preliminary and permanent injunctive relief against the enforcement of the mandatory retirement provisions cited, as well as the convening of a three-judge district court, 28 U.S.C. §§ 2281, 2284. The District Court, finding no substantial constitutional question, dismissed the action (9a). On appeal, the Court of Appeals for the Second Circuit, affirmed (1a). Seeing the questions as whether the constitutional grounds raised were "wholly insubstantial and frivolous" under the rule of *Goosby* v. *Osser,* 409 U.S. 512 (1973), the appeals court agreed with the District Court that the issue of age restrictions upon the term of state judges is a legislative one for the State. The effort to place it in a constitutional context was seen as frivolous.

Reasons for Denying Certiorari

A. The Court of Appeals was correct in determining the complaint frivolous

The only question properly before this Court is that raised by the *Rubino* petitioners (74-1468) as only they filed a complaint or any other papers in the District Court. Thus we are simply faced with whether a 70 year old retirement provision for state court judges (who happen to be elected) raises any constitutional question. In light of prior decisions of this Court, all current, it is submitted it does not. Thus in *Weisbrod* v. *Lynn,* 383 F. Supp. 933 (D.D.C. 1974), a three-judge court upheld mandatory retirement at age 70 for federal employees regardless of health or mental ability. This was affirmed. —— U.S. ——, 43 L. Ed. 2d 420 (Feb. 24, 1975). See also *McIlvaine* v. *Pennsylvania,* 6 Pa. Cmwlth. 505, 296 A. 2d 630 (1972),

affd. 309 A. 2d 801 (1973), app. dismd. 415 U.S. 986 (1974). By the rule of *Goosby* v. *Osser, supra,* the constitutional question presented is frivolous because it is foreclosed by prior Supreme Court decisions.

Any effort to clothe the instant matter in a First Amendment context is obviously frivolous, as the right to vote or be on the ballot is simply not involved. Opin., 2d Cir. (4a-5a). The judges involved were on the ballot and no one was prevented from voting for them.

B. The Limited Certification Procedure for Superior Court Judges does not deny equal protection to petitioners

Although not the crux of the complaint or even a question presented the petitioners contend that New York, by allowing Supreme Court, Appellate Division and Court of Appeals judges to be "certificated" for service past age 70, with an absolute maximum of 76, N.Y. Const., Art. 6, § 25, subd. b, violates their rights to "equal protection". This is a frivolous contention and quite correctly not even discussed in the Court of Appeals decision. This was not the basis of the complaint and peripheral to mandatory retirement. It is an obviously rational distinction to continue for a limited period the services of superior court judges, as opposed to inferior court judges. The service and experience of the former can be considered by the Legislature and the people more valuable than the latter. In this area of extension of service, reform, if that it really be, may be taken "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 809 (1969) citing *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489 (1955).

The petitioner Nusbaum also appears to present the same untenable contention. The fact that Civil Court judges may be temporarily assigned to the Supreme Court by State constitutional provision is totally a matter for the

Appellate Division's discretion. N.Y. Const., Art. 6, § 26. Many non-elected judges also may be so temporarily assigned. Inferior court judges exercise the jurisdiction of the Supreme Court only while so temporarily assigned, but they do not achieve the status of the Supreme Court Justice, for the purpose of tenure and the fact of such assignment does not in any way affect the status of such civil court judges.*

CONCLUSION

The petitions for a writ of certiorari should be denied.

Dated: New York, New York, June 30, 1975.

Respectfully submitted,

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Attorney General of the
State of New York
Attorney for Respondent Ghezzi and Pro Se pursuant to New York Executive Law § 71

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* We doubt that Judge Nusbaum has any right to be a petitioner as he failed to comply to Rule 24(c) of the Federal Rules of Civil Procedure in any way. The record below fails to reveal any pleading by him or even any adoption of petitioners Rubino and Zichello's pleading.